NOS. 71-886 and 71-890

IN THE

Supreme Court of the United States

October Term, 1971

C. V. RORIE, JR., ET AL., *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

BRIEF IN OPPOSITION TO PETITIONS OF C. V. RORIE, STRACHAN SHIPPING COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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BRIEF IN OPPOSITION TO PETITIONS OF C. V. RORIE, STRACHAN SHIPPING COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petition for Writ of Certiorari was heretofore filed under No. 71-886 on behalf of Strachan Shipping Company and Texas Employers Insurance Association. Petition was likewise filed under No. 71-890 on behalf of Petitioner, C. V. Rorie, Jr. Since both Petitions arise from the same action and raise substantially the same points, Respondent's Brief in Opposition is directed to both of such Petitions.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Texas, in affirming the Trial Court's Judgment Non Obstante Veredicto,

properly applied Federal and State substantive law to the case, in holding that the City of Galveston's duly published Tariff No. 4-B was controlling, wherein the Tariff provided that its crane and operator be leased to Strachan Shipping Company and that the stevedore shall have the right of control over the operator, being a loaned employee to the stevedore.

2. Whether or not the Respondent's Tariff No. 4-B needed prior approval of the Maritime Commission for its effectuation.

3. Whether or not the Tariff provision leasing the crane and operator, under loaned-servant doctrine to the stevedore, is unenforceable on its face.

4. Whether the decision of the Supreme Court of Texas denied Petitioner any right to a Jury trial.

5. Whether or not any federally created right of Petitioners was violated by the Court of Civil Appeals holding certain Special Issues improper and whether such alleged point of error was properly preserved for this Court's consideration.

STATEMENT OF THE CASE

Respondent takes issue only with statement of Petitioners that the Jury's findings were made "upon an abundance of testimony." Otherwise it is admitted that Petitioner, C. V. Rorie, Jr., a longshoreman, invoked the jurisdiction of the District Court of Galveston County, Texas, to recover damages for personal injuries sustained by him more than eleven (11) years ago, on September 6, 1960. There has been presented no issue of unseaworthiness or breach of duty of the City of Galveston to

perform any stevedoring services in a good and workmanlike manner.

The sole basis for recovery of Petitioner urged herein is based upon common law negligence as to Respondent.

REASONS FOR DENYING THE WRITS

I. THE DECISION OF THE TEXAS SUPREME COURT IS CONSISTENT WITH EXISTING FEDERAL ADMIRALTY LAW AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The City of Galveston, acting by and through the Board of Trustees of the Galveston Wharves, is a terminal operator of a port facility at Galveston, Texas. Strachan Shipping Company is a stevedoring company performing such services at the port. The Galveston Wharves' duly published Tariff is the one instrument evidencing the myriad contractual responsibilities and duties between Respondent, hereinafter called "Galveston Wharves", and its users, and, in particular, said Tariff outlines the terms of lease of the crane in question. (Appendix, p. 1). It is undisputed that the Tariff was duly published effective January 7, 1960, and a copy was sent to various shipping interests, including Petitioner, Strachan Shipping Company. (Appendix, pp. 4, 5). The Tariff provision pertaining to the lease of the crane and its operator had been in effect at the Galveston Wharves since July 1, 1958. (Appendix, p. 5). Strachan Shipping Company had, on numerous previous occasions, and on the occasion in question, accepted the use of the crane and its operator, though Strachan was free to use its own crane or lease cranes from someone else, if it desired. Strachan did so in many instances. (Appendix, p. 5).

The Supreme Court of Texas properly held that the Tariff in question was binding upon the City and all persons dealings with it, holding, with regard to the Tariffs:

> "They entered into and became a part of the Lease Agreement between the City and Strachan".

Additionally, the Texas Supreme Court held:

> "The two employers in this case (Galveston Wharves and Strachan) did, in effect, expressly agree that Strachan would have the right to control the hoist and its operator".

Texas City Terminal Railway Company v. American Equitable Assurance Company of N. Y. (USDC, S.D., Tex. 1955), 130 F. Sup. 843, and authorities therein cited.

The Court's decision followed, and is consistent with, the decision in *Southern Steamship Company v. Meyners* (C.A. 5th, 1940), 110 F.2d 376 (cert. denied, 311 U.S. 674, 85 L.E. 433), in which the Court of Civil Appeals for the Fifth Circuit considered the question of the effect of a lease of a crane and its operator to a stevedoring company under the terms of a terminal operator's Tariff. The situation in the *Meyner's* case, supra, is almost identical to that of the Galveston Wharves and Strachan, whereunder the Navigation District, under its Tariff arrangement with Southern Steamship Company, leased an overhead crane and its operator to Southern. Meyners was injured, alleging negligence of the crane operator. The Court, in considering the Navigation District's Tariff, which is very similar to that of the Galveston Wharves, applied the Tariff and found it binding on the parties.

The Court's Opinion is in no way contrary to *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 99 L.Ed. 911 (1955), since this Honorable Court's decision in the *Bisso* case is neither applicable to the instant case nor controlling.

In *Bisso*, supra, the Court considered a written Charter Contract between the owner of a tug and the owner of a barge damaged in the tow of the tug, providing that the movement shall be at the "sole risk" of the towed barge; and that the entire master, crew and employees of the tug should become employees of the barge. This Honorable Court there held that the attempt to shift sole responsibility from the carrier to the owner of the barge and the cargo being towed was against public policy and thus invalid. This Court there considered the loaned-servant provision as purely a fiction.

The facts in the *Bisso* case, supra, are entirely different from those in the case at hand. The Court, in *Bisso*, was dealing with a common carrier, or at least a contract carrier acting as such. The long-standing prohibition against a carrier's attempting to limit its liability to consignors and consignees in regard to interstate shipments to less than that prescribed by Federal law is well known and well accepted. However, this uniformly applied law applies only to loss or damage to cargo, containers or commodities involved in interstate transportation by a carrier. As the Texas Court properly held in its Opinion, the Galveston Wharves, in entering into a crane lease agreement through its Tariff, was certainly not operating as a common carrier.

The Galveston Wharves' Tariff does not attempt to limit its common-carrier liability with a stipulation from

its own negligence. A close reading of the applicable Tariff language shows no intent or implication that the Galveston Wharves is attempting to exculpate itself from its own negligence or that of its employees. The Galveston Wharves remains responsible to all persons for negligence from the entire complement of its employees, other than with regard to the particular lease of the crane in question, where the stevedore, as lessee, elects to accept the loaned employee of the Galveston Wharves to operate the crane.

There is certainly no monopoly or overreaching by the Galveston Wharves in leasing the crane in question. It is one piece of specialized machinery provided by the Galveston Wharves to all who care to use it. It is a convenience provided for persons who care to use it, but stevedores are free to use their own cranes or lease cranes from somebody else, if they so desire, which they have done in many instances. (Appendix, p. 5).

Cases cited by Petitioner deal with attempts by common carriers to exculpate themselves from any liability or to limit the common carrier's liability for loss or damage to cargo and containers. *Boston & Maine Railroad v. Piper*, 246 U.S. 439, 62 L.Ed. 820 (1918); *Southern Express Company v. Caldwell*, 22 L.Ed 556 (1875); *Boston Metals Company v. SS WINDING GULF*, 349 U.S. 122, 99 L.Ed. 933 (1955); and *Dixilyn Drilling Corporation v. Crescent Towing & Salvage Company*, 372 U.S. 697, 10 L.Ed.2d 78 (1963). None of these cases speak to the Tariff provisions of the terminal operator with regard to the lease of a crane and its operator.

Even were the Tariff lease agreement considered to be an exculpatory clause, which it certainly is not, it would not be void and unenforceable on its face. *Southwestern*

Sugar & Molasses Company v. River Terminal Corporation, 360 U.S. 411, 3 L.Ed.2d 1334 (1959). This Honorable Court therein considered an action filed against the water carrier for loss of cargo and sinking of Petitioner's barge, which was being towed by carrier, wherein the carrier's Tariff had a provision exculpating the tug-carrier from liability for lost cargo, where such cargo was being transported in a barge furnished by the owner. This Honorable Court there held that such a proviso was not illegal on its face, holding:

> "We hold that the Court of Appeals correctly ruled that the exculpatory clause here at issue should not be struck down as a matter of law, and that the parties should be afforded reasonable opportunity to obtain from the ICC, in an approprate formal proceeding, a determination as to the particular circumstances of the tugboat industry which lends justification to this form of clause, if any there be, or which militate toward a rule holding, validating such provisions, regardless of the fact that the carrier which seeks to invoke them is subject to prospective and retrospective rate regulations."

II. THE COURT BELOW PROPERLY HELD THAT TARIFF NO. 4-B OF RESPONDENT WAS LEGAL, DID NOT REQUIRE PRIOR APPROVAL OF THE MARITIME COMMISSION, AND WAS BINDING BETWEEN THE PARTIES.

The evidence is undisputed that the Galveston Wharves' Tariff was filed with the Federal Maritime Commission prior to and at the time of plaintiff's injury. It is further admitted that no formal Order of Approval was issued by said Commission. The City of Galveston duly published the Tariff in question, effective January 7, 1960,

and sent a copy to various shipping interests, including Petitioner, Strachan Shipping Company. (Appendix, pp. 4, 5). Strachan Shipping Company had, on numerous previous occasions and on the occasion in question, accepted the use of the crane and its operator, although Strachan was free to use its own crane or lease cranes from someone else, if it desired. Strachan did so in many instances. (Appendix, p. 5).

Prior to June 1, 1967, the Maritime Commission did not even require the filing of Tariffs much less approval of same. By its General Order 15, dated October 5, 1965, 30 FR 12681, the Commission provided for the filing of Tariffs and Tariff changes before the effective date, except as required by Commission Order or Agreements approved pursuant to Section 15 of the Shipping Act of 1916 (46 USC, Sec. 814).

A wharf Tariff pertaining to the leasing of a shore-based crane is not such an agreement as described in Section 15 of the Act, as evidenced by the plain language of Section 15. (Appendix, p. 2). With regard to the necessity of seeking approval of the Maritime Commission of wharf terminal Tariffs, the Court, in *Bird v. S.S. FORTUNA* (USDC, Mass. 1966), 262 F. Sup. 24, 26, said:

> "Analogous provisions in the Shipping Act require Commission approval of Tariffs established by carriers, 46 USC, Sec. 817, but not of Tariffs of non-carriers, such as wharf operators."

The Maritime Commission, in its Amicus Curiae Brief filed in the Supreme Court of the State of Texas, acknowledged that it requires Tariffs of terminal operators furnishing services in connection with common carriers by

water to file their duly published Tariffs, but stated that there is no requirement for approval of such Tariffs prior to their effectuation. The Commission, in its Brief, states that Tariffs which have been filed in conformance with the requirements of the Commission's General Order 15 become effective when filed on or before their effective date, as provided by such Order, unless rejected by the Commission. (Appendix, p. 3). The Commission has, in fact, in the past specifically investigated in a formal proceeding the validity of the Galveston Wharves' Tariff No. 4-B, and, in *Selden & Company v. Trustees of Galveston Wharves*, 7 FMC 679 (1964), the Commission found lawful a Tariff amendment to Tariff No. 4-B, whereby Galveston Wharves increased demurrage charges by mere publication of the Tariff providing such increase, the Commission specifically holding that the Tariff Amendment issued and filed with the Commission was in effect and binding upon Selden & Company.

Apparently Petitioner, Strachan Shipping Company, though abiding by and operating under the Galveston Wharves' Tariffs for years and accepting and using the crane and its operator, now contends that the Tariff is not binding on it. If the Galveston Wharves' Tariff is not the instrument evidencing the myriad contractual responsibilities and duties between the Galveston Wharves and its users, then what instrument does establish this contractual relationship? The *Port of Tacoma v. SS DUVAL*, 364 F.2d 615 (9th Cir. 1966), is of little solace to Petitioners, since the Court there held that the provision of the Port's Tariff, purporting to give the Port a lien, did not give constructive notice of the lien provision in the Tariff to the owner of a vessel in derogation of the owner's rights under its Charter. In this case, the evidence is

uncontroverted that Strachan Shipping Company was furnished a copy of the applicable Tariff. Therefore, it had actual notice of the Tariff provisions.

Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261, 19 L.Ed.2d 1090 (1968), cited by Petitioner, is just not in point. The *Volkswagenwerk* case involved a written Agreement between a Maritime Association on the Pacific Coast with Union representatives, which Agreement required a $29,000,000.00 levy over five (5) years, bound all principal carriers, stevedores and terminal operators on the Pacific Coast, and necessarily resulted in substantial increase in stevedoring and terminal charges. This Honorable Court there held that the Maritime Commission erred in holding that such an Agreement was of a de minimus or routine nature and did not require filing and approval under Section 15, in view of the enormity of the proposal and its obvious substantial effect on the maritime industry.

The Texas Supreme Court further properly held, as a secondary basis for its ruling that the Tariff in question is not a type of agreement required to be filed under Section 15 of the Shipping Act of 1916 for effectuation, that the Tariff lease provisions, though an agreement binding on the parties, do not constitute an agreement made by a common carrier by water or other persons subject to the Chapter "with another such carrier or other person subject to the Chapter". The Court pointed out that, though the Galveston Wharves is clearly "other person subject to the Chapter" by reason of operating its terminal facility in connection with a water carrier (46 USCA, Sec. 814), there is no evidence to suggest that Strachan is either a common carrier by water or "other person subject to this Chapter", within the meaning of the statute.

Strachan Shipping Company is a stevedoring company only, and there is no evidence that it is a terminal operator or a common carrier by water. It is much in the same position as the stevedoring company in *Henry Gillen's Sons Lighterage, Inc., et al v. American Stevedores, Inc., et al*, 12 FMC 325 (1969), in which the Maritime Commission ruled that a stevedoring company, not performing any terminal operations and not being a common carrier by water, is not "other persons subject to the Act". The Commission said:

> "It seems reasonable to assume that stevedoring as such was excluded simply because stevedores, to the extent that their services are rendered in connection with common carriers by water, are merely servants or contractors employed by carrier or terminal operators who are subject to the Act."

III. NO RIGHT OF TRIAL BY JURY WAS DENIED PETITIONER RORIE BY THE COURTS BELOW.

No right of trial by Jury was abridged by the Judgment of the Trial Court notwithstanding the verdict, or by the affirmance of the Trial Court's Judgment by the Texas Supreme Court. Under the decision of the Texas Supreme Court, the question of "right to control the operator of the crane" was foreclosed as a matter of law; the only question remaining for Jury determination was whether the City interfered with such right of control. As the Texas Supreme Court stated (at p. 9 in Petitioner's Appendix):

> "There is no evidence here that the City had ever interfered with a lessee's right to control the equip-

> ment and its operator, and it does not appear that the supervisor or any other representative of the City attempted to exercise any control over the manner in which McPeters operated the hoist in unloading the vessel for Strachan. In our opinion the evidence in this case will not support the conclusion that, despite the provisions of the Tariff, McPeters remained under the City's control in his operation of the hoist on the occasion in question".

The Texas rule, as is the rule in Federal Courts, is that a Trial Court may not disregard Jury findings of fact and enter Judgment notwithstanding a verdict, unless there is no evidence of probative value upon which the Jury could have relied in making its determination of fact. *Burt v. Lochausen*, 249 S.W.2d 194, 199 (Tex. S.Ct. 1952); and *Lavender v. Kurn* (1946), 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916.

The rule is firmly established, and not denied by Petitioner, that when a claim founded in Federal law is triable and tried in a State Court, the State Court rules of practice and procedure are to be applied.

For example, the decision of this Court in the Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U.S. 1, 56 L.Ed. 327, 32 S.Ct. 169, a suit brought under the Federal Employer Liability Act, stated:

> "There is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of State Courts or to control or affect their modes of procedure, but only the question of the duty of such a Court, when its ordinary jurisdiction is prescribed by local rules and is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of

an action to enforce a right of civil recovery arising under the Act of Congress and susceptible of adjudication according to the prevailing rules of procedure."

There are numerous cases supporting the proposition that State rules of practice and procedure may govern such questions as the manner and form of directing verdicts, the formal basis on which verdicts may be sustained, and the necessity, form and effect of instructions to the Jury. This Court, in *Chesapeake and Ohio Rail Co. v. DeAtley* (1916), 241 U.S. 310, 60 L.Ed. 1016, 36 S.Ct. 564, approved the assumption of the State Court that a local rule of practice, requiring that the Court substitute a proper instruction for one requested which was incorrect in form or substance with respect to any issue upon which the Jury should be instructed, was applicable.

Further, other decisions of this Court in the litigation of personal injury claims grounded on Federally created rights have firmly established that, although the right to trial by Jury is one which is to be zealously guarded, State practice of allowing verdicts by Juries of less than twelve (12), and by less than unanimous verdicts, may be followed in cases brought in State Courts. *St. Louis & S. F. R. Co. v. Brown* (1916), 241 U.S. 223, 60 L.Ed. 966, 36 S.Ct. 602; *Louisville & N. R. Co. v. Stewart* (1916), 241 U.S. 261, 60 L.Ed. 989, 36 S.Ct. 586; and *Chicago R. I. & P. R. Co. v. Ward* (1920), 252 U.S. 18, 64 L. Ed. 430, 40 S.Ct. 275.

The Court, in *King v. Schumacher* (1939), 32 Cal. App. 2d 172, 89 P.2d 466, (cert. den'd., 308 U.S. 593, 84 L.Ed. 496, 60 S.Ct. 123), held that a State rule, to the effect that a general verdict will be sustained if it can

be justified on the basis of any one of the theories set forth in the complaint, was applicable, regardless of whether it was in conflict with the practice in Federal Court, stating that where an action founded on a Federal statute is properly brought in the State Courts, the law of the State, in the absence of any contrary provisions in the Federal statute, is controlling in all manners of practice and procedure.

The Court, in *Marshall v. Chicago R. I. & P. R. Co.* (1916), 133 Minn. 460, 157 N.W. 638 (err. dism'd., 246 U.S. 678, 62 L.Ed. 934, 38 S.Ct. 333), held that it was proper to use a State procedure for directing Judgment notwithstanding a verdict for the plaintiff, stating that it could not perceive such practice represented any greater departure from that followed in Federal Courts in allowing less than unanimous verdicts.

The California Court, in *Woodward v. Southern Pacific Co.* (1939), 35 Cal. App. 2d 130, 94 P.2d 1028 (cert. den'd., 309 U.S. 671, 84 L.Ed. 1016, 60 S.Ct. 614), held that the law of the forum is controlling with respect to the matter of directing a verdict and the entry of Judgment notwithstanding the verdict.

None of the cases cited by Petitioner are controlling, or even persuasive, of the issue before this Court. *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942), concerned the question of the validity of a Release executed by a Seaman. This Court, emphasizing the traditional protected status of Seamen, held that a State rule, casting the burden of proof that a Release was invalid on the party alleging the invalidity of the Release, must yield to the Federal rule, supported by specific statutory provisions that where the claimant

and person executing the Release is a Seaman, the burden of proving the Release valid is on the party arguing in favor of such validity.

McAllister v. Magnolia Petroleum, 357 U.S. 221, 2 L. Ed.2d 1272, 78 S.Ct. 1201 (1958), and *Flowers v. Savannah Machine & Foundry Co.*, 310 F.2d 135 (5th Cir. 1962), both turned on the question of what statute of limitations to apply. The holdings in these cases were that to apply the shorter State statute of limitations, or to use it by analogy for determining when latches would run under Admiralty rule, rather than using the longer limitation period provided under the F.E.L.A., would abridge the rights of claimants. The statute of limitations was denominated substantive rather than procedural.

All three (3) of these cases, of course, recognized the general rule that, in the trial of a claim based on Federal law in State Court, where it is triable there, State rules of practice and procedure apply.

The case of *Pope and Talbot v. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953), also cited by Petitioner, is not in point. Here, plaintiff brought suit in the Federal District Court in Pennsylvania under diversity jurisdiction. The defendant argued that Pennsylvania substantive law should, therefore, be applied, since this was a diversity suit, and that questions of contributory negligence were proper ones to be used as the common law rule which was in effect in Pennsylvania. Plaintiff had alleged both unseaworthiness and Jones Act negligence. This Court did not decide whether it had jurisdiction under "diversity" or "arising under", but held that, in any case, in enforcing this claim, Federal Courts would apply their own practice and procedure.

The case of *United Industrial Workers of Seafarers International Union of North America, etc. v. Board of Trustees of Galveston Wharves*, 351 F.2d 183 (5th Cir. 1965), is completely irrelevant and not in point. This litigation involved a Contract dispute which arose when the Galveston Wharves leased a grain elevator (Elevator B) to the Bunge Corporation during the term of an Employment Contract between the Wharves and the Union. Under the Lease, Bunge took over the operations at the grain elevator entirely and the City went out of the business of operating the elevator and, therefore, laid off its men. The dispute involved whether the City had a right to do this, since there was a valid Employment Contract with the Union in effect, and whether the City was obligated to bargain with the Union about this as a change in working conditions.

IV. HOLDING OF THE COURT OF CIVIL APPEALS THAT SPECIAL ISSUES 12 AND 13 WERE IMPROPERLY SUBMITTED UNDER TEXAS PROCEDURAL LAW WAS PROPER, AND, IN ANY EVENT, PETITIONERS FAILED TO PRESERVE THE ALLEGED POINT OF ERROR THAT SUCH ACTION VIOLATED ANY FEDERALLY CREATED RIGHT.

This Court should not consider the alleged Point of Error attacking the holding of the Court of Civil Appeals that Special Issues 12 and 13 were global, and thus improper, because Petitioners failed to urge their objections that such holding violated Federal standards in their Application for Writ of Error to the Texas Supreme Court, and such Court, therefore, had no opportunity to pass upon the question. Petitioners did not properly assert the

question of violation of Federal standards at the appropriate time below, but merely urged this Point of Error as a matter of State law. Further, this point is purely a matter of State procedure.

The Texas Supreme Court did not rule on this question and, therefore, this Court does not have jurisdiction under Title 28, Section 1257, Subdivision 3, or under Rule 19a of the Rules of the Supreme Court.

As the Texas Supreme Court held that McPeters, the crane operator, as a matter of law, was the loaned-servant of Strachan (on the twin grounds that the Petitioners were bound by the provisions of a properly filed Tariff and that, as Strachan had notice of the Tariff provisions, such Tariff provisions were in any case incorporated in and made a part of the Contract between the Respondent and Strachan), no decision on the alleged global nature of the Issues was necessary, and the Supreme Court did not pass on the question. Further, the Supreme Court held that there was no evidence in the record whatsoever showing that the City had interfered with Strachan's right of control.

The next to the last paragraph in the Texas Supreme Court's Opinion, which Petitioner seems to be contending shows that the Court did pass on this issue, does not bear out this contention. This paragraph of the Texas Court's Opinion simply holds that, as to Strachan, the Jury finding on this issue is binding, because Strachan made no objection to the issue in the Trial Court and, in fact, had argued for its validity and appropriateness all during the appellate process. Strachan had, therefore, waived any complaint as to the form of this submission to the Jury, and was bound by the Jury's finding on it. *Texas Rules*

of Civil Procedure, Rule 274. See also *Federal Rules of Civil Procedure, Rules 46 and 51.*

It is, likewise, well settled, by decisions of this Court, that, in order to secure review by this Court of a State Court's ruling on a Federal question, or on such a ruling which affects a right asserted under Federal law, the Petitioner must raise his Federal question or Federal right clearly at the appropriate time before the State Courts. *Montana v. Rice*, 27 S.Ct. 281; 204 U.S. 291, 51 L.Ed. 490 (1907). In the *Rice* case, supra, the Court held that the raising of the Federal question for the first time in a Petition for a Writ of Error to a State Court and the accompanying assignment of errors is not sufficient to enable the Federal Supreme Court to consider that question, even though another Federal question had been properly raised and brought up by the same Writ of Error. To the same point, the Court, in *Louisville & N. R. Co. v. Woodford*, 34 S.Ct. 739, 234 U.S. 46, 58 L.Ed. 1202 (1914), stated:

> "The decisions of this Court have not only repeatedly held that a Federal right, in order to be reviewable here, must be set up and denied in a State Court, but have often held that such claim of denial is not properly brought to the attention of this Court where it appears that the State Court declined to pass on the question because it was not raised at the Trial Court, as required by State practice".

See *Radio Station WOW, Inc. v. Johnson*, 65 S.Ct. 1475, 326 U.S. 120, 89 L.Ed. 2092 (1945), holding that where a question is first presented to the highest State Court on a Petition for Rehearing, it came too late for consideration by the Federal Supreme Court on certiorari, unless the

State Court exerted its jurisdiction in such a way that the case could have been taken to the Federal Supreme Court if the question had been raised prior to the original disposition. See *Atlantic Coast Line R. Company v. Mims*, 244 U.S. 532, 61 L.Ed. 476, 37 S.Ct. 188 (1917).

The form and appropriateness of the submission of Special Issues 12 and 13 is purely a matter of State procedure. The question of whether Special Issue No. 12 appropriately submitted the issue of negligence of McPeters to the Jury is certainly distinguishable from the issue involved in the cases cited by Petitioner. For example, *McAllister v. Magnolia Petroleum Company*, supra, considered a case involving the basic definition of "unseaworthiness", which this Court took cognizance of "in furtherance of sound judicial administration". The definition of a basic substantive right of a claimant in a maritime case is certainly distinguishable from the mere procedural matter of the form of an Issue submitting to the Jury the question of negligence on the part of a person alleged to have been at fault in causing the injuries complained of.

Holding that State rules of practice and procedure govern such questions as the manner and form of directing verdicts and the necessity, form and effect of instructions to the Jury are *Chesapeake & Ohio Railway Company v. DeAtley*, supra; *King v. Schumacher*, supra; *Woodward v. Southern Pacific*, supra; and *Marshall v. Chicago R. I. & P. R. Co.*, supra.

Accordingly, the alleged Point of Error, that the Court of Civil Appeals, in holding Special Issues 12 and 13 to be improper under State procedural law, in violation of Federal standards, has not been preserved for this Court's

consideration, and, has not been passed upon by the Court of last resort of the State of Texas, and, in any event, the Court of Civil Appeals' ruling was proper.

CONCLUSION

It is, therefore, respectfully prayed that the Petitions for Certiorari should be denied in their entirety.

Respectfully submitted,

McLEOD, ALEXANDER, POWEL & APFFEL

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of February, 1972, a true and correct copy of the foregoing was mailed to:

Mr. Arthur J. Mandell
Messrs. Mandell & Wright
Attorneys at Law
1901 First National Life Building
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Attorneys for C. V. Borie, Jr.;

Mr. Ted Goller
Messrs. Fulbright, Crooker & Jaworski
Attorneys at Law
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Attorneys for Strachan Shipping Company
and Texas Employers' Insurance Company; and

Mr. Bryan F. Williams, Jr.
Messrs. Royston, Rayzor & Cook
Attorneys at Law
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Attorneys for Avenue Shipping Company, Ltd.,
and Trinder, Anderson & Company, Ltd.

by placing the same in properly addressed envelopes, postage prepaid, and depositing the same in the United States Mails.

Benjamin R. Powel

BENJAMIN R. POWEL

APPENDIX

NOS. 71-886 and 71-890

IN THE

Supreme Court of the United States

October Term, 1971

C. V. RORIE, JR., ET AL., *Petitioners*

v.

CITY OF GALVESTON, *Respondent*

APPENDIX TO

BRIEF IN OPPOSITION TO PETITIONS OF C. V. RORIE, STRACHAN SHIPPING COMPANY AND TEXAS EMPLOYERS INSURANCE ASSOCIATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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APPENDIX

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APPENDIX

EXCERPTS FROM GALVESTON WHARVES TARIFF CIRCULAR NO. 4-B, naming Rules and Regulations governing Dockage, Shed Hire and Other Services and Charges Applying at the Facilities of the Galveston Wharves:

Item No. 25—Subject: *Responsibility for Charges, Etc.*

The use of the waterways and facilities under jurisdiction of the Galveston Wharves shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities, to pay all charges specified, including any and all damages to property as provided in Item 70 or reissues, and to be governed by all rules and regulations contained in this tariff.

Item No. 97—Subject: *Lessee Responsibility:*

When cranes, derricks, hoists, conveyors, lift trucks, trucks, tractors, etc., are rented or leased to others, it is expressly understood that the unit will be operated under the direction and control of the lessee and the lessee shall be responsible for the operation thereof, and the lessee assumes all risks for injuries or damages which may arise or grow out of the use or operation of said unit.

It is hereby understood and agreed that in the event lessee uses the operator of said unit employed by the Galveston Wharves, such operator shall be under the direction of the lessee and the operator shall be

considered as the agent or servant of the lessee and lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the lessee to make a thorough inspection and satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representation or warranties with reference to such matters.

46 USCA, Section 814, provides in part:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements. . . .

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications,

and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

EXCERPT FROM AMICUS CURIAE OF THE FEDERAL MARITIME COMMISSION, IN THE TEXAS SUPREME COURT:

Although, as we have indicated, tariffs of terminal operators furnishing services in connection with common carriers by water are required to be filed pursuant to the Commission's General Order 15 (46 C.F.R., Sec. 533), there is no requirement for approval of such tariffs prior to their effectuation. Tariffs which have been filed in conformance with the requirements of the Commission's General Order 15 become effective when filed on or before their effective date as provided by such order, unless rejected by the Commission.

Although courts have, from time to time, spoken of regulatory agencies as "approving" tariffs, the word has been used only for the purpose of showing that provisions in a tariff which are required to be filed with a regulatory agency may not be applied unless such tariff is lawfully on file with the agency. Thus, for example, in *Lichten v. Eastern Air Lines*, 189 F.2d 939 (2d Cir. 1951), the word "approve" is used as being synonymous with the word "accept".

EXTRACTS FROM REPORTER'S TRANSCRIPT OF TRIAL PROCEEDINGS

(357) E. C. ROBINSON, Former Traffic Manager for Galveston Wharves

MR. McLEOD: Let me rephrase the question. I will ask you whether or not Tariff No. 4-B was filed with the Federal Maritime Commission.

A: It was.

Q: Did you yourself file that?

A: Yes. It was mailed from my office on the date of issuance, December 4, 1959.

Q: In addition to filing this with the Federal Maritime Commission, I will ask you whether or not you sent copies of this to the various shipping agents, shipping companies and stevedoring firms operating in the City of Galveston.

A: We did.

Q: And particularly I will ask you whether or not a copy of this was sent to Strachan Shipping Co.

A: It was.

Q: At the time of issuance?
A: Yes, sir.
Q: What was the effective date of this particular tariff?
A: January 7, 1960.
Q: I will ask you whether or not that tariff was in effect on September 6, 1960.
A: Yes.

(361)

MR. McLEOD: How long before September 6, 1960, was a similar Item 97 in the tariffs of Galveston Wharves?

A: Item 97 of Supplement A to Galveston Wharves Circular 4-A was published effective July 1, 1958.

MR. McLEOD: Then, I will ask you whether or not the same tariff provision as Item 97 has been in effect since July 1, 1958.

A: Yes, sir. That item was brought forward in the reissue of the tariff. It was brought forward as Supplement A to the tariff here up to the present time.

(465) W. H. SANDBERG, Retired General Manager of Galveston Wharves

Q: I will ask you whether or not the stevedores were free to use their own cranes or somebody else's cranes if they so desired.
A: They had that right, and they did in several, in many instances.
Q: Well, have there been instances, and were there instances back around the time of September, 1960, where stevedores actually used their own cranes?

A: Yes. In fact we have one case where a stevedore used his own crane and his own operator, and this Maintenance of Way Union made a case of it before the Mediation Board, and the Mediation Board upheld Galveston Wharves, that it was permissible.

Q: That it was permissible?

A: Yes, sir.

Q: Was there any rule or regulation or requirement of any kind of the Galveston Wharves that would prohibit a ship from using its own winches to unload a ship such as a ship with a cargo of ore?

A: We had no restrictions.

Q: Well, is it fair to say that it was up to the stevedore whether to rent your equipment or not and that he was free to use other means, including other cranes, if he wanted to, to unload a ship?

A: It was his prerogative.

(525) FRANK J. GARCIA, Ship Foreman

Q: Have you seen them use any type of crane down there?

A: On Pier 14?

Q: Wherever they load U. A. R. flour.

A: Oh, yes. They use them mobile cranes.

Q: And you have seen cranes used down there that didn't belong to Galveston Wharves, haven't you?

A: Yes, sir.

Q: That is all. Thank you.

(579) JOHN W. CAIN, Operating Engineer for Atlantic & Gulf Stevedores

Q: What about cranes for heavy lifts, barge-type cranes, have you used those?

A: I have used them, but there isn't any in Galveston. It has been quite some time back.

Q: Galveston Wharves doesn't have those for rent?

A: No. Galveston Wharves doesn't have those.

Q: Have you seen any cranes working in areas in the Port of Galveston where there was no trackage, railroad trackage?

A: Yes. I have seen them working on Pier 26.

Q: When was that?

A: About two weeks ago.

Q: There were no tracks on Pier 26?

A: No, no tracks on Pier 26.

Q: Do you know who owned the crane in that instance?

A: I believe it belongs to a company called Allied—well, the last name I couldn't tell you. I think it is a local company.

(584)

Q: I believe you told us there are some cranes available here in the Galveston area. You mentioned one in particular, the Allied; is that correct?

A: Yes. They are available as far as I know. I have never used them.

Q: But you have seen them being used?

A: I have seen them on Pier 26.

Q: Have you seen any other cranes operating on any other piers in Galveston other than Pier 26 that didn't belong to the City of Galveston?

A: Yes, I have seen some, I think, at Pier 39. I believe they had one down there some time back, a rubber-tired crane.